IN THE SUPREME COURT OF IOWA

Supreme Court No. 10-1932
Mitchell County No. CMNTA0002423

MITCHELL COUNTY,

Plaintiff-Appellee,

v.

MATTHEW HOOVER ZIMMERMAN,

Defendant-Appellant.

Appeal from the Iowa District Court for Mitchell County
The Honorable Bryan H. McKinley, Judge

APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings and Disposition of the Case in the District Court

Defendant-Appellant Matthew Hoover Zimmerman brings this Application for Discretionary Review challenging the constitutionality of Mitchell County Local Ordinance No. 41, the Road Protection Ordinance (the "Ordinance"), because it violates the Free Exercise clauses of both the First Amendment and article 1, section 3 of the Iowa Constitution.

Matthew is cited for violating the Ordinance on February 1, 2010. App. 1. On March 1, 2010 he moves to dismiss the citation on constitutional grounds. App. 2-3. The matter is tried before the Magistrate on May 5, 2010. The Magistrate finds Matthew guilty of violating the ordinance subject to ruling on his Motion to Dismiss. App. 4.

On May 21, 2010 the Magistrate denies Matthew's Motion to Dismiss. App. 5-8. Although the Magistrate finds that the use of steel wheels on tractors is a sincerely held practice of the Old Order of Groffdale Mennonite Conference's faith and the Ordinance substantially burdens this religious practice, the Magistrate concludes nevertheless that Mitchell County maintained an overriding economic interest in protecting its roads from damage by steel-wheeled vehicles. App. 5-8.

Matthew timely files a Notice of Appeal on June 1, 2010. App. 9. The district court determines, however, that the record on appeal is inadequate due to the fact that the proceedings before the Magistrate were not recorded properly. On October 11, 2010 the district court held a second evidentiary hearing on Matthew's Motion to Dismiss.

On October 27, 2010 the district court affirmed the Magistrate's May 21, 2010 Order. App. 94-106.

Facts Relevant to the Issues Presented for Review

The Old Order of Groffdale Mennonite Conference prohibits its members from operating any vehicle, including farm machinery such as tractors, that is equipped with rubber tires. App. at 19:4-14; 22:2-4 This has been the Conference's sincerely held religious belief and practice since its formation as a separate body in 1929. App. at 17:3-7. It is a strictly enforced rule among the members of this religious community; violation of this prohibition results in excommunication from the Conference. App. at 20:18-20; 21:6-25 to 22:1-15; 24:4-23. The practical result of this religious belief is that members drive their steel-wheeled tractors on county roads to gain access to their various farm fields, as well as to markets where they sell their agricultural products. App. at 22:16-25 to 23:1-2; 23:12-25 to 24:1-7.

The modern steel wheel represents state-of-the-art technology for the Conference. In order to lessen the potential for damage to the road, members have adjusted both the height and width of the lug or cleat, the portion of the wheel that makes contact with the road surface, over the past few decades. App. at 14:25 to 17:2; 35:7-25. An additional design modification, *i.e.*, the incorporation of a rubber belt to which lugs are affixed, cushions the impact between the lug and roadway. App. at 14:25 to 17:2. The current design minimizes scarring to the road without sacrificing safe operation of the tractor. App. at 16:12-13; 31:12-25; 35:20-25 to 36:1-4.

Despite the advancements in steel wheel design, as well as decades of peaceful coexistence, the Mitchell County Board of Supervisors decides that tractors operated by members of the Conference are causing inordinate damage to the newly paved county roads. It enacts an ordinance to protect the County's $9 million investment in road resurfacing. The Ordinance provides:

> No person shall drive over the hard surfaced roadways, including but not limited to cement, concrete and blacktop roads, of Mitchell County, or any political subdivision thereof, a tractor or vehicle equipped with steel or metal tires equipped with cleats, ice picks, studs, spikes, chains or other projections of any kind or steel or metal wheels equipped with cleats, ice picks, studs, spikes, chains or other projections of any kind.

App. 75.

The Ordinance also states that it does not intend to conflict with Iowa Code § 321.442, and that "no provision of that Code Section shall be deemed to have been eliminated by this ordinance." App. 76. This is significant because Iowa Code §321.442 contains several exceptions, including (1) farm machinery with tires that have protuberances [in context, it is clear that this means protuberances of materials other than rubber] that will not injure the highway, (2) tire chains of reasonable proportions upon any vehicle when required for safety because of snow, ice, or other conditions tending to cause a vehicle to skid, and (3) pneumatic tires with inserted ice grips or tire studs projecting not more than one-sixteenth inch beyond the tread of the traction surface of the tire upon any vehicle from November 1 to April 1, and on school buses and fire department emergency apparatus at any time. *See* Iowa Code § 321.442 (2009). Penalties for violating this ordinance include a fine of up to $500 and/or 30 days in jail. App. 76.

Mitchell County employs a 15-year rotation for road resurfacing projects. App. at 71:19-25. The need for resurfacing can arise from any number of causes that are independent of the use of steel-wheeled tractors, including settling and the natural freeze-thaw cycle. App. at 70:13-20, 21-25. The roads that Mitchell County claims have been "damaged" by these tractors are still drivable. App. at 72:21-24. They have not been closed nor have there been any estimates made

regarding the cost of repair. App. at 72:25 to 73:1-8. Mitchell County is unable to quantify how soon the roads will need resurfacing due to ordinary wear by steel-wheel tractors. App. at 70:6-13.

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court pursuant to Iowa R. App. P. 6.1101(2) because the case presents substantial constitutional questions as to the validity of an ordinance, substantial issues of first impression, fundamental issues of broad public importance requiring prompt or ultimate determination by the Supreme Court and substantial questions of enunciating or changing legal principles.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING THE MOTION TO DISMISS BECAUSE THE APPLICATION OF THE ORDINANCE AGAINST MATTHEW, A MEMBER OF THE OLD ORDER OF GROFFDALE MENNONITES CONFERENCE VIOLATES THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

PRESERVATION OF ERROR / STANDARD OF REVIEW: Matthew preserved error on the issue of the constitutionality of the ordinance by timely filing a Motion to Dismiss, appealing the adverse ruling of the same to the district court, and filing an Application for Discretionary Review with the Iowa Supreme Court. It is well established that the Supreme Court's review of constitutional issues is de novo. *See State v. Lyman*, 776 N.W.2d 865, 873 (Iowa 2010).

The government may burden religious exercise only through rationally-based, neutral regulations of general applicability. *See Employment Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872, 879 (1990). A regulation that is not neutral or generally applicable violates the Free Exercise Clause unless the government can prove that it is narrowly tailored to advance a compelling interest. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993).

A. The Ordinance Substantially Burdens the Religious Freedom of the Old Order Groffdale Mennonites.

The Ordinance severely threatens the ability of the Mennonites to follow their religious beliefs and continue to be contributing members of society. Because the Mennonites will not violate their religious beliefs, and because the Ordinance effectively excludes them from all paved roads in Mitchell County, the Ordinance

makes it at least very difficult, and probably impossible, for them to access their crops or get those crops to market. Without being able to access their crops, their entire way of life is threatened. *See State v. Hershberger*, 462 N.W.2d 393, 396 (Minn. 1990) ("Buggy and other slow moving vehicle transportation is an integral part of the Amish communal life and worship, so that a statute infringing on such transportation impairs associational freedoms.").

B. The Ordinance is not Generally Applicable.

A law is generally applicable if it equally burdens religious and non-religious conduct without making exceptions that undermine its purpose. *Lukumi*, 508 U.S. at 533-540, 543-546. Here, the Ordinance is not generally applicable, because it contains many exceptions that undermine its purpose.

In *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, the Supreme Court struck down a series of city ordinances that prohibited the practice of religious animal sacrifice while allowing other animal killings, including those associated with hunting, fishing, meat production, and pest control. *Lukumi,* 508 U.S. at 536-537. The Court examined the city's interests allegedly supporting the ordinances—preventing cruelty to animals and protecting public health. It found that the ordinances were "underinclusive for these ends" because they "fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree

than [religious animal sacrifice]." *Id.* at 543. The law was underinclusive not only because it allowed secular conduct similar to the religious conduct that was forbidden, but also because it allowed dissimilar conduct that caused the same harms or undermined the same governmental interests as the religious conduct that was forbidden. Because the garbage bins of restaurants posed the same health risks as were allegedly caused by sacrifice of animals, but the restaurants were not as tightly regulated as sacrifice, the ban on sacrifice required strict scrutiny. *Id.* at 544-45.

In *Employment Division v. Smith*, the Court distinguished *Sherbert v. Verner*, 374 U.S. 398 (1963), and similar cases involving persons who lost their jobs because of their religious practice and then applied for unemployment compensation. The unemployment compensation laws had "individualized exemptions" that allowed some people to collect unemployment benefits even when their inability to find work was caused by their own personal choices. There could not be many acceptable reasons for refusing work but still collecting unemployment compensation, but the law allowed "at least some 'personal reasons.'" *Smith*, 494 U.S. at 884. This shows that even very narrow secular exceptions make a law that burdens religion less than generally applicable, and thus trigger strict scrutiny.

In *Lukumi*, the Court repeated *Smith*'s statement about the importance of "individual exemptions" in triggering strict scrutiny. But in *Lukumi*, the Court also

relied on categorical exceptions, such as the exceptions for hunting, fishing, and pest control. "[C]ategories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Lukumi*, 508 U.S. at 542. In *Lukumi*, few killings of animals were prohibited except for religious sacrifices, but the Court stated explicitly that the rule was not limited to that situation. The Court said that "these ordinances fall well below the minimum standard necessary to protect First Amendment rights." *Id.* at 543.

Because the law was underinclusive and burdened Free Exercise, the Court applied strict scrutiny to the ordinances. It found that the city's interests "could be achieved by narrower ordinances that burdened religion to a far lesser degree" and found that, under its strict scrutiny analysis, "[t]he absence of narrow tailoring suffices to establish the invalidity of the ordinances." *Id.* at 546. "It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* at 547 (internal quotations omitted).

Two Third Circuit cases, authored by then-Judge Samuel Alito, further illustrate the *Smith/Lukumi* general-applicability analysis. In *Fraternal Order of Police Newark Lodge v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), the court considered a police policy that prohibited officers from wearing beards but offered

exemptions to two categories: (1) officers who had medical reasons for wearing a beard; and (2) officers who were undercover. *Id.* at 360. Two Muslim officers requested an exemption from the policy for religious reasons, but were denied. The City's reason for the policy was to promote uniform appearance among its officers. *Id.* at 366. The exception for undercover officers did not harm the purpose of the policy—as undercover officers are, by nature, out of uniform—and accordingly would not have resulted in imposition of heightened scrutiny. However, the exemption for medical reasons did undermine that policy—it applied to uniformed officers who would be recognized as officers, and rendered their appearance non-uniform to the extent of their beards. *Id.* The court in *Newark* emphasized that the rule and its exception implied a value judgment that medical needs were less important than religious needs, and that it was this implicit value judgment that the Free Exercise Clause prohibits. *Id.* at 364-65, quoting *Lukumi*, 508 U.S. at 537-38. Thus, the policy as it was applied to the Muslim officers was subject to heightened scrutiny under the Free Exercise Clause and found to be unconstitutional. *Id.*

In *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3d Cir. 2004), a Lakota Indian kept two bears on his property to conduct religious ceremonies in keeping with his tribe's traditions. *Id.* at 204. A state law prohibited privately keeping wildlife without paying a fee for a permit. The purported state interest in the law was to

discourage "the keeping of wild animals in captivity" and to generate revenue. *Id.* at 211. Nonetheless, zoos and nationally recognized circuses were exempt from the fee requirement. *Id.* As a result, the court found the law not generally applicable under *Smith* and *Lukumi*, because the zoo and circus exemptions "work against the Commonwealth's asserted goal of discouraging the keeping of wild animals in captivity" and its interest in generating revenue. *Id.* Thus, Pennsylvania's decision not to grant an exemption for religious reasons was subject to strict scrutiny and declared to be unconstitutional as a violation of the Free Exercise Clause.

Here, the Ordinance, although prohibiting certain protuberances on wheels, contains several exemptions that undermine its purpose. The exemptions are found in Iowa Code §321.442 and appear to be expressly incorporated into the Ordinance. App. 76. As a result, the Ordinance exempts farm machinery with tires that have protuberances that will not injure the highway. *See* Iowa Code §321.442(1). Steel tire chains are exempted if they are of "reasonable proportions" and are required for safety under conditions "tending to cause a vehicle to skid." *See id.* at (2). Ice grips and tire studs up to one-sixteenth of an inch are permitted five months a year, and at any time on school buses and fire department emergency vehicles. *See id.*

These exclusions undermine the County's purpose of preventing damage to the roads. Why is the Board of Supervisors concerned about damage caused by these small tractors, but not damage caused by chains on cars or ice grips on school buses? Why are tractors with steel protuberances allowed if they do not harm the road, but the use of steel-wheel vehicles by Old Order of Groffdale Conference Mennonites in Mitchell County presumptively damages the paved surface of the roads? And, more importantly, how does Mitchell County make these determinations? The bottom line is that the Ordinance is filled with exceptions, which makes it not generally applicable. As a result, it must pass strict scrutiny before it can be applied in a manner to burden the Mennonite's religious beliefs and practices.

The Ordinance is also underinclusive in a more general way. All vehicles harm the roads. This harm is incremental. Heavy trucks with eighteen wheels damage the roads, arguably far more than small tractors at issue. The record here is devoid of any research to justify a conclusion that steel-wheeled tractors are more harmful than heavy trucks.

Mitchell County cannot make a value judgment that commercial truck traffic is more important than Mennonite religious practice, or that secular travel in snowy weather is more important than Mennonite religious practice, or that eliminating the

expense of changing the tires on school buses is more important than Mennonite religious practice. The County may not understand or appreciate the Mennonite teachings against rubber tired vehicles, but it must treat the resulting religious practice as favorably as it treats the most favored secular reasons for driving vehicles that damage the roads. That is the lesson of *Smith*, *Lukumi*, and *Newark*.

For all these reasons, the Ordinance is not generally applicable and can be upheld only if it is narrowly tailored to further a compelling interest. *See Smith*, 494 U.S. at 879.

C. There is no Narrowly Tailored Compelling Government Interest Sufficient to Justify the Ordinance.

The County does not have a compelling interest here, and even if it did, prohibiting the Mennonites from using the roads with their tires is not narrowly tailored to achieve that interest. "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 46. Such a law "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." *Id.*, quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978), and *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

For many decades, no Board of Supervisors found it necessary to ban Mennonite steel wheels. That in itself is strong evidence that there is not suddenly a compelling need to ban them now. The County has articulated merely an economic

interest in protecting its roads. But, as the Court is well aware, damage to roads is caused incrementally by many uses. The County has no compelling interest in singling out Mennonite tractors for damage to which all vehicles contribute.

Even if Mitchell County had a compelling interest, Ordinance No. 41 it is not narrowly tailored to serve that interest. First of all, it is a flat ban on all steel tires regardless of the amount of harm they might cause. Broadly banning any and all steel wheels that have protuberances on them—without any determination as to the varying levels of damage caused by them in comparison with other road uses—is not narrowly tailored.

And even if the rational basis test were used instead of strict scrutiny, the Ordinance would still be unconstitutional. There is no evidence that the use of county roads by a group as small as the Mennonites has damaged the roads any more than the many other road uses that are permitted. The government can allow this small religious group to continue to use the road and follow its religious traditions without suffering harm.

II. THE DISTRICT COURT ERRED IN DENYING THE MOTION TO DISMISS BECAUSE THE APPLICATION OF THE ORDINANCE AGAINST MATTHEW, A MEMBER OF THE OLD ORDER OF GROFFDALE MENNONITE CONFERENCE, VIOLATES THE FREE EXERCISE CLAUSE THE ARTICLE 1, § 3 OF THE IOWA CONSTITUTION

PRESERVATION OF ERROR / STANDARD OF REVIEW: Matthew preserved error on the issue of the constitutionality of the ordinance by timely filing a Motion to Dismiss, appealing the adverse ruling of the same to the district court, and filing an Application for Discretionary Review with the Iowa Supreme Court. It is well established that the Supreme Court's review of constitutional issues is de novo. *See State v. Lyman*, 776 N.W.2d 865, 873 (Iowa 2010).

The Ordinance also violates the Free Exercise clause of the Iowa Constitution. Article 1, section 3 provides that the state "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry." The Iowa Supreme Court has not yet interpreted this provision. The first question is whether Iowa will follow the United States Supreme Court analysis in *Employment Division v. Smith*, 494 U.S. 872 (1990) or instead join with the great majority of state supreme courts in rejecting that decision when considering free exercise issues in the context of state constitutional provisions.

A. Iowa Should Properly Balance the Right to the Free Exercise of Religion with Society's Interests.

The threshold question is whether the Iowa Constitution protects against all laws that burden the free exercise of religion, or only against some subset of laws. In 1990, in a bitterly disputed five-four decision,[1] the Supreme Court held that the federal Free Exercise Clause provides significant protection only from laws that are not neutral or are not generally applicable. *See generally Smith*; *see also* Part I *supra.* Of course this decision was not an interpretation of the Iowa Constitution, and there is no reason to believe the Iowa Supreme Court would automatically follow it. Plainly, Matthew contends the Iowa Supreme Court should not follow it.

By its terms, the Iowa Constitution says that "no law" shall prohibit the free exercise of religion. The clause is not limited to certain subsets of laws. It does not say that the state shall make no law prohibiting the free exercise of religion except for laws that are neutral and generally applicable. The Old Order of Groffdale Mennonite Conference's practice of driving only steel-wheeled tractors is undoubtedly an exercise of religion. The Ordinance undoubtedly prohibits that practice. Textually, the Iowa free exercise clause applies to the Ordinance's ban on these steel-wheeled vehicles.

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1. The briefs are described in Justice Souter's concurring opinion in *Lukumi*. 508 U.S. at 571-72. They are also available on Westlaw, with links to the briefs at the end of the Court's opinion. No one asked the Court to do what it did in *Smith*, and no one knew to argue against it or had any opportunity to do so.

Prior to *Smith*, federal courts required a compelling government interest to justify a law that burdened the exercise of religion. But if Iowa were to adopt the federal *Smith* rule, a generally applicable law would be valid, however frivolous the government's interest and however great the interference with religious liberty. For example, if a law against consumption of alcohol by minors is neutral and generally applicable, then under *Smith*, the state could deprive minors of the sacrament of Holy Communion in Catholic, Episcopal, and other churches that use real wine for communion, and a fortiori the state could suppress First Communion, traditionally celebrated at about age seven. A dry county could then entirely exclude the central religious ritual of these churches.

This new requirement in federal cases has been rejected by most state courts that have considered it. Ten state courts have expressly rejected it as an interpretation of their own constitutions;[2] six others have rendered decisions inconsistent with it.[3]

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2. *See Larson v. Cooper*, 90 P.3d 125, 131 & n.31 (Alaska 2004); *City Chapel Evangelical Free Inc. v. City of South Bend*, 744 N.E.2d 443, 445-51 (Ind. 2001); *Fortin v. Roman Catholic Bishop*, 871 A.2d 1208, 1227-28 (Me. 2005); *Rasheed v. Comm'r of Corrections*, 845 N.E.2d 296, 208 (Mass. 2006) (citing *Attorney Gen. v. Desilets*, 636 N.E.2d 233, 235-41 (Mass. 1994)); *McCready v. Hoffius*, 586 N.W.2d 723, 729 (Mich. 1998), *vacated on other grounds*, 593 N.W.2d 545 (Mich. 1999); *Odenthal v. Minn. Conference of Seventh-day Adventists*, 649 N.W.2d 426, 441-41 (Minn. 2002) (citing *State v. Hershberger*, 462 N.W.2d 393, 397-99 (Minn. 1990)); *Catholic Charities v. Serio*, 859 N.E.2d 459, 465-68 (N.Y. 2006); *Humphrey v. Lane*, 728 N.E.2d 1039, 1043-45 (Ohio 2000); *City of Woodlinville v. Northshore United Church of Christ*, 211 P.3d 406, 410 (Wash. 2009), citing *First Covenant Church v. City of Seattle*, 840 P.2d 174 (1992); *Coulee Catholic Schs. v. Labor & Indus Review Comm'n*, 768 N.W.2d 868, 884-87 (Wis. 2009) (citing *State v. Miller*, 549 N.W.2d 235, 238-42 (Wis. 1996)).

3. *State v. Evans*, 796 P.2d 178, 180 (Kan. Ct. App. 1990); *Kentucky State Bd. for Elem. & Secondary Educ. v. Rudasill*, 589 S.W.2d 877 (Ky. 1979); *In re Brown*, 478 So.2d 1033, 1037-39 & n.5 (Miss. 1985); *St. John's Lutheran Church v. State Comp. Ins. Fund*, 830 P.2d 1271, 1276-77 (Mont. 1992); *In re Browning*, 476 S.E.2d 465, 467 (N.C. Ct. App. 1996); *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 107, 111 (Tenn. 1975).

Only two state supreme courts have followed *Smith* in reasoned opinions.[4] Three others accepted it without analysis.[5] The *Smith* opinion has also been subjected to intense criticism by dissenting justices[6] and by scholars.[7]

The Supreme Courts of Minnesota and Wisconsin have each protected the Amish communities in their state under the state constitution, rejecting the federal rule in *Smith*. *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990); *State v. Miller*, 549 N.W.2d 235 (Wis. 1996). The Minnesota court said that the compelling interest test would "strike a balance under the Minnesota constitution between freedom of conscience and the state's public safety interest." *Hershberger*, 462 N.W.2d at 398. The Wisconsin court adopted this reasoning, too, as its own. *See Miller*, 549 N.W.2d at 240. Each case involved regulation of the Amish buggies in the interest of public safety. The mere assertion of an interest in highway safety did not excuse the state from proving that its interest was compelling and that the burden on religion was necessary to achieve the interest. By contrast, the new federal test does not "strike a

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4. *In re Anaya*, 725 N.W.2d 10, 17-20 (Neb. 2008); *Smith v. Employment Div.*, 721 P.2d 445, 446-49 (Or. 1986), *vacated on other grounds*, 485 U.S. 660 (1988).

5. *Archdiocese of Washington v. Moersen*, 925 A.2d 659, 661 (Md. 2007); *Appeal of Smith*, 652 A.2d 154, 160-61 (N.H. 1994); *State v. Hall*, 2009 WL 3320261 (Vt. 2009).

6. *Lukumi*, 508 U.S. at 559-77 (Souter, J., concurring in part); *Smith*, 494 U.S. 872, 892-903 (O'Connor, J., concurring in judgment); id. at 907-09 (Blackmun, J., dissenting).

7. *See, e.g.*, James D. Gordon III, *Free Exercise on the Mountaintop*, 79 Cal. L. Rev. 91 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109 (1990).

balance" between constitutional and regulatory interests because the test of general applicability has little relationship to the weight of either interest.

The Supreme Court of Washington criticized the consequences of the new federal rule:

> The majority's analysis in *Smith* II . . . places free exercise in a subordinate, instead of preferred, position. . . . *Smith* II accepts the fact that its rule places minority religions at a disadvantage. Our court, conversely, has rejected the idea that a political majority may control a minority's right of free exercise through the political process.

First Covenant Church v. City of Seattle, 840 P.2d 174, 187 (Wash. 1992). The Washington court's reference is to the following sentence in the *Smith* opinion: "[L]eaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in." *Smith*, 494 U.S. at 890. In plain language, the religious observances of small religions will sometimes be outlawed with insufficient reason, or even with no good reason at all. This is the precise evil that free exercise clauses are supposed to avoid.

The Supreme Judicial Court of Massachusetts rejected *Smith* even though its free exercise clause—"No law shall be passed prohibiting the free exercise of religion"—is virtually identical to the text of the federal Free Exercise Clause. *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994). "Despite the similarity of the two constitutional provisions, this court should reach its own conclusions on

the scope of the protections of art. 46, § 1, and should not necessarily follow the reasoning adopted by the Supreme Court of the United States under the First Amendment." *Id.* at 235.

The new federal rule has been so widely rejected because it simply does not serve the American tradition of religious liberty. It does not serve the purposes either of the constitutional guarantee or of the state's occasional need to override the constitutional guarantee, because it disregards the relative importance of each interest. The Supreme Court of Minnesota explained it very well when it said, "Competing values of such significance require this court to look for an alternative that achieves both values. . . . To infringe upon religious freedoms which this state has traditionally revered, the state must demonstrate that public safety cannot be achieved through reasonable alternative means." *Hershberger*, 462 N.W.2d at 399.

B. Iowa Decisions Concerning the Free Exercise of Religion are Inconsistent with the Federal *Smith* test.

The Supreme Court of Iowa has not formally interpreted the state's Free Exercise Clause. But what the Iowa courts have said about free exercise indicates a willingness to protect the free exercise of religion against all laws, not merely laws that fail a test of neutrality or general applicability.

The leading Iowa decision on free exercise of religion is *State v. Amana Society*, 132 Iowa 304, 109 N.W. 894 (Iowa 1906). There, the state argued that the

Amana colonies were incorporated under the not-for-profit corporation act, but engaged in for-profit businesses in violation of that charter. The Court said nothing about whether the limitations on not-for-profit corporations were neutral and generally applicable. Rather, the Court held that the Amana businesses were part of that community's exercise of religion, and thus fully authorized by the not-for-profit charter. This decision was based on statutory interpretation and not directly on the free exercise clause of the Iowa Constitution. But in interpreting the statute, the court was plainly guided by a deep commitment to religious liberty:

> [I]n view of the spirit of tolerance and liberality which has pervaded our institutions from the earliest times, we have not hesitated in giving the statute an interpretation such as is warranted by its language and which shall avoid the persecution of any and protect all in the free exercise of religious faith, regardless of what that faith may be. Under the blessings of free government, every citizen should be permitted to pursue that mode of life which is dictated by his own conscience . . . .

See Amana Society, 109 N.W. at 899. "In this country the conscience is not subject to any human law and the right to its free exercise, so long as this is not inimicable to the peace and good order of society, is guaranteed by the Constitution." *Id.* at 897.

Greater protection by the Iowa Constitution is also evident in a series of unpublished opinions in the Court of Appeals. That court held that parents' right to punish their children in conformance with their religious beliefs can be limited "[i]n cases in which harm to the physical or mental health of the child or to the public

safety, peace, order, or welfare is demonstrated . . . " *In re A.O.*, 2002 WL 1973910, *5 (Iowa App. 2002). The court did not cite *Smith* or any other federal free exercise cases. It held that the state's interest overrode the parent's free exercise rights because it was "compelling." The court plainly assumed that the compelling interest test, and not the new federal law, applied to free exercise review of this generally applicable law. To similar effect is *In Re N.F.*, 2002 WL 31758353, *2 (Iowa App. Dec. 11, 2002), which holds that "a state may intervene to prevent or stop certain conduct that presents a health or safety hazard, despite individuals' religious beliefs." It too ignores the federal free exercise cases; instead, it cites a compelling interest case from California, *People v. Hodges*, 13 Cal. Rptr. 2d 412, 418-20 (Cal. Ct. App. 1992).

Finally, the Iowa Supreme Court has repeatedly demonstrated its willingness to interpret the Iowa Constitution as providing greater protection than the federal counterpart. Most recently, in *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009), the Court struck down a ban on same-sex marriage under Iowa's equal protection clause. The Court acknowledged the value of federal precedent, but "refuse[d] to follow it blindly." *Id.* at 878 n.6. The Court held that gays and lesbians are a quasi-suspect class and applied heightened scrutiny, *id.* at 889-906, conclusions far beyond anything the United States Supreme Court has suggested. In *Lawrence v.*

Texas, 539 U.S. 558 (2003), in striking down a ban on "deviate sexual intercourse," the Court did not rely on equal protection, did not find any form of either a fundamental right or suspect or quasi-suspect class, and did not invoke any form of heightened scrutiny. It said only that the Texas law "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual," *id.* at 578, apparently a form of rational basis review. And it expressly disclaimed any implications of its decision for whether the state "must give formal recognition" to same-sex relationships. *Id. Varnum* is a bold, unanimous, and wholly independent interpretation of the Iowa Constitution, untethered to federal law.

Of course Iowa has a long history of such decisions. *See Varnum*, 763 N.W.2d at 877 (collecting prominent examples). Other such decisions are more obscure, but equally independent. *See, e.g., In re S.A.J.B.*, 679 N.W.2d 645 (Iowa 2004) (holding, under Iowa equal protection clause, that indigent defendant in suit to terminate parental rights is entitled to attorney at state expense); *Callender v. Skiles*, 591 N.W.2d 182 (Iowa 1999) (holding that one claiming to be father of a child born to a woman married to another man has a state due process right to a hearing to establish his paternity, rejecting the contrary decision in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989)); *Bierkamp v. Rogers*, 293 N.W.2d 577, 579 (Iowa 1980) (striking down the automobile guest statute as an irrational denial of equal protection

under the Iowa Constitution). The court has also emphatically stated its independent authority to interpret the Iowa Constitution in other cases where it interpreted the state and federal constitutions to each support the same result. *See, e.g., In re A.W.*, 741 N.W.2d 793, 806, 812-13 (Iowa 2007).

Fundamental rights under the Iowa Constitution are protected by a requirement of a compelling government interest and narrowly tailored means. *S.A.J.B.*, 679 N.W.2d at 649. The right to free exercise of religion is a fundamental right, and should be subject to the same test. There is no reason to think that the Iowa Supreme Court would follow the United States Supreme Court's abrupt revision of free exercise law in *Smith*, blindly or otherwise, and no reason why it should. Iowa law should reflect a proper balance between government police power and religious freedom. That proper balance suggests that before the government acts to burden a person's religious beliefs and practices, it should demonstrate that its interests are sufficiently important to justify burdening a fundamental constitutional right and that its interests cannot be achieved in any other way. *See Hershberger*, 462 N.W.2d at 398 ("the state should be required to demonstrate that public safety cannot be achieved by proposed alternative means.") However the standard of judicial review is formulated, laws that can be described as "neutral and generally applicable" should not be wholly exempt from it.

C. Application of the Iowa Free Exercise Clause is Straightforward.

As explained in Part I, the Ordinance burdens the free exercise of the Old Order of Groffdale Mennonite Conference's faith in the absence of a compelling governmental interest. That is all the analysis needed if article I, section 3 of the Iowa Constitution applies to *all* laws. The complex analysis of whether exceptions to the Ordinance render it not neutral, or not generally applicable, is unnecessary under the Iowa Constitution.

But if the Iowa Supreme Court follows *Smith* and introduces that exception for generally applicable laws into the Iowa free exercise clause, then the analysis under the Iowa Constitution would be identical to the analysis of the United States Constitution in Part I. Either way, the Ordinance violates the free exercise clause of the Iowa Constitution.

CONCLUSION

The compelling interest test does not mean that every religious belief and practice will automatically trump every law that burdens it. What it does mean, however, is that before a law can be enforced in such a manner as to require a religious group to abandon its sincerely held religious beliefs and practices in order to be members of society, the state should have a compelling reason that cannot be accomplished in some other way.

Because the Ordinance burdens the Old Order of Groffdale Mennonite Conference's religiously motivated use of steel-wheeled tractors, and because, when read with Iowa Code §321.442, the ordinance is not generally applicable, it violates both the Constitution of the United States and the Iowa Constitution unless it is narrowly tailored to serve a compelling governmental interest. There is no sufficient governmental interest in the record before the court.

Defendant respectfully requests the Court enter an Order ruling Ordinance No. 41 unconstitutional and remanding the matter to the Magistrate for further proceedings.

REQUEST FOR ORAL ARGUMENT

Matthew hereby requests to be heard in oral arguments upon submission of the case.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

This brief complied with the type-volume limitations of Iowa R. App. P. 6.903(1)(g)(1) because the brief contains 7,030 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1). The brief further complied with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because the brief has been prepared in

a proportionally-spaced typeface using Times New Roman in size 14 font.

ATTORNEY'S COST CERTIFICATE

I, Colin C. Murphy, attorney for the Appellant, hereby certify that the actual cost of reproducing the necessary copies of this Brief was $245.50 and that amount has been paid in full by me.

PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on the 14th day of June, 2011 I served this document by mailing two copies to Mitchell County Attorney, 515 State Street, Osage, Iowa 50461.

I further certify that on the 14th day of June, 2011 I will file this document by mailing 18 copies of it to the Clerk of the Iowa Supreme Court, Judicial Branch Building, 1111East Court Avenue, Des Moines, Iowa 50319.

Respectfully submitted,

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